IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL ST.NO. 2436 OF 2002

1. Balu @ Vishwanath Hiru Metkari.
2. Sou.Shobhatai w/o.Balu Shelke. ... Appellants.

Versus.

1. Baban Hiru Metkari.
2. Sou.Lilabai w/o.Shivaji Hirugade.
3. Sou.Sampadabi w/o.Biru Shelke.
4. Vasant Hiru Metkari. ... Respondents.

Shri Vilas Kolekar for the Appellants.

Shri S.D.Rairkar for the Respondent Nos.1, 2a to 2d, and 3.

Shri A.J.Chougule for the Respondents Nos.4 and 5.

CORAM : ABHAY S. OKA, J.

DATED : 4th May, 2005.

ORAL JUDGMENT:

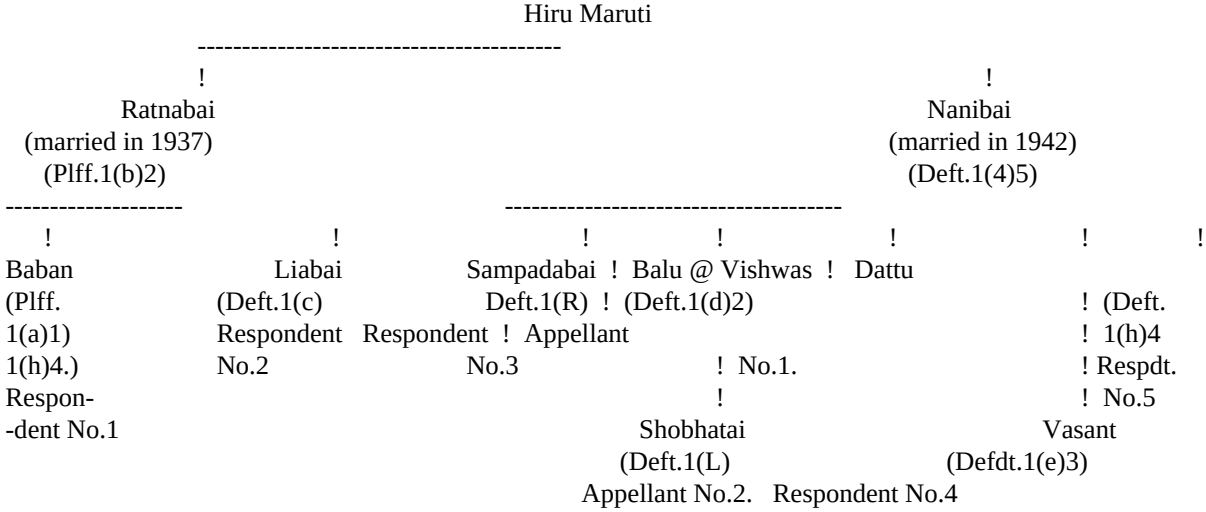
1. Heard the learned Advocates appearing for the parties. The following substantial questions of law arise in the Second Appeal:

(i) Whether the Courts below have committed error while calculating the respective shares of the parties in the suit properties?

(ii) Whether the Courts below were right in denying share in the dwelling house when the suit was filed by one of the male heir of deceased Hiru?

2. Second Appeal is admitted on the aforesaid substantial questions of law. The learned Advocate appearing for the Respondents waive service. By consent taken up for hearing forthwith.

3. With a view of the appreciate the submissions made by the parties, it will be necessary to refer to the facts of the case. The Respondent No.1(a)1 along with one Ratnabai are the original Plaintiffs. The present Appellants are the original Defendants Nos.2(d)2 and 1(L). The genealogy showing the relationship between parties is as under:



The prayer in the suit filed by the original Plaintiffs is for partition and separate possession. The original Plaintiff No.2 (Ratnabai) died during the pendency of the proceedings.

4. The learned trial Judge decreed the suit by holding

that the original Plaintiff No.1 was having 1/8th share with the original Defendant No.5 in all the suit properties. The learned trial Judge held that the Plaintiff No.2 was legally wedded wife of the original Defendant no.1 Hiru. The trial Court negatived the contention raised by the original Defendants that the land bearing Survey No.384/3/A of village Vita was the self acquired property of the Defendant No.5. The trial Court also held that all the suit properties are joint family properties. An Appeal was preferred in the District Court by the Appellants herein. Though the Appellate Court dismissed the Appeal, the shares allotted to the parties were modified. The Appellate Court held that the only surviving Plaintiff i.e. Plaintiff No.1 was entitled to 8/35th share in the suit land. the Appellate Court held that the daughters of the Defendant No.1 were not entitled to partition and separate possession of the dwelling house.

5. The learned Counsel appearing for the Appellants submitted that the property mentioned in paragraph 1(b) of the plaint cannot be subjected to partition as the said property was self acquired property of the original Defendant No.1 purchased in name of Nanibai i.e. one of the wives of the deceased Hiru. He submitted that the original Plaintiff No.2 was not the legally wedded wife of deceased Hiru and the Plaintiff No.1 was not the son of the deceased Hiru. The learned Counsel further

submitted that the Appellate Court has not considered the evidence on record and has not calculated the shares of the parties correctly.

6. The learned counsel appearing for the Respondents Nos.1, 2a to 2d and 3 has supported the impugned Judgment and decree. However, he has assisted the Court by pointing out the legal position as regards the shares held by the parties.

7. I have considered the rival submissions. The learned trial Judge as well as the Appellate Court Judge has considered the submissions made as regards the house property bearing No.271. After considering the evidence on record a finding is recorded that the suit house property was liable to be partitioned. In so far as the findings regarding the status of the suit properties are concerned, I find that the findings recorded by the Courts below are essentially findings of fact which need no interference.

8. The Courts below have held that the marriage between the deceased Hiru and Ratnabai and the deceased Hiru and Nanibai had taken place prior to 1947 and therefore, both the relationships are valid. It is established that the marriage between Hiru and Ratnabai and the marriage between Hiru and Nanibai are lawful marriages The reason is that when the marriages took place, there

was no restraint on the second marriage. The question which arises is what should be the shares of the respective parties. If genealogy showing the relationship between the parties is perused about which there is no dispute, it is obvious that the Courts below have committed error in calculating the shares. As it is held that the entire suit property is ancestral property in the hands of Hiru, the four sons of Hiru will get a share equal to that of their father by applying principle of notional partition under section 6 of the Hindu Succession Act, 1956 (hereinafter referred to as the said Act of 1956). The wives of Hiru will take one share together. Thus at the time of demise of Hiru, the Plaintiff No.1 was entitled to 1/6th share and Plaintiff No.2 Ratnabai was entitled to 1/12th share. After his death, the 1/6th share of Hiru will have to be further divided amongst the class I heirs specified by the said Act of 1956. Ratnabai and Nanibai will get one share together and the other class of heirs will get one share each. Therefore, after demise of Hiru shares will have to be calculated in the light of the provisions of section 8 to 10 read with section 6 of the said Act of 1956. Thus it appears that on the demise of Hiru his sons and daughters will get 1/48th share each in the undivided share of Hiru. Thus the 1/6th share of Hiru will be divided in 8 equal shares i.e. 1/48. During the pendency of the proceedings both Ratnabai and Nanibai have expired. Therefore, calculations will have

to be made after taking into account the shares which are allotted to their shares. Thus the shares to which the parties are entitled to read thus:

At the time of Hiru's death	After Hiru's death.	After Ratnabai's death.	After Nanibai's death.
Hiru 1/6	-	-	-
Ratnabai 1/12	1/12+1/96=9/96	-	-
Nanibai 1/12	1/12+1/96=9/96	9/96	-
Baban 1/6	1/6+1/48=9/48 = 20/108	9/48+9/192 = 45/192	45/192
Balu 1/6	1/6+1/48=9/48 = 20/108	9/48	9/48+9/480 =99/480
Vasant 1/6	1/6+1/48=9/48 = 20/108	9/48	9/48+9/480 =99/480
Dattu 1/6	1/6+1/48=9/48 = 20/108	9/48	9/48+9/480 =99/480
Leelabai	1/48	1/48+9/192= = 13/192	13/192
Sampadabai 1/48		1/48	1/48+9/480 = 19/480
Shobhatai 1/48		1/48	1/48+9/480 = 19/480

9. From the above discussion, it is apparent that the Courts below have committed an error while calculating the shares. One of the male heirs of deceased Hiru is a Plaintiff who sought possession of the suit dwelling house. At his instance suit for partition of dwelling

house was maintainable. Therefore, in suit dwelling house also female members will be entitled to claim a share. Hence the Decrees passed by the Courts below need modification.

10. Hence I pass the following order:

(a) The Decrees passed by the Courts below are substituted by following:

(i) There shall be a preliminary decree for partition and parties to the suit are entitled to the following shares in the suit properties :

1) Plaintiff No.1(a)1 Baban - 45/192.

2) The legal heirs of the Defendant No.1(c) Leelabai - 13/192.

3) Defendant No.1(R) Sampadabai-19/480

4) Defendant No.1(L) Shobhatai -19/480

5) Defendant No.1(d)2, 1(c)3, and 1(a)4 i.e. Balu, Vasant and Dattu - 99/480 each.

(ii) In case of the property which is subject to the assessment of land revenue, the partition will have to be effected in accordance with section 54

of the Code of Civil Procedure, 1908. In respect of rest of the property, the Court will appoint a Commissioner for effecting partition.

(iii) There will be no order as to costs.

(b) There will be no order as to costs in the Second Appeal.

(c) Parties to act on an authenticated copy of the order.

Judge.